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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN 26 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

In-Flight Phone Corporation

Petition For Acceptance of
Application Or, Alternatively
Waiver of Section 1.402(c) of the
Rules To Permit Consideration of
an Application for Pioneer's
Preference for Airline Audio
Service in the 900 MHz Band

ET Docket No. 92-100
PP-_____

COMMENTS OF PACTEL PAGING

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SUMMARY

In view of its longstanding participation and role in the narrowband PCS docket (ET Docket No. 92-100), PacTel has a substantial interest in In-Flight Phone Corporation's petition for acceptance of its application for a pioneer preference, or alternatively, a waiver of the Commission's Rules to permit consideration of the application. In-Flight is requesting a preference to operate a live audio news, information and entertainment service for airline passengers in the 901-902 and 940-941 MHz bands. PacTel opposes the acceptance of In-Flight's application as grossly untimely and urges the Commission to dismiss the application. Since In-Flight filed its application 105 days after the adoption of the PCS Notice of Proposed Rulemaking, the Commission's Rules clearly prohibit its acceptance.

Allowing pioneer preference requests to be filed outside of the Commission's established cut-off procedures would subject the Commission and all commenters to continuing rounds of comments and replies and would disrupt and further delay Commission action in regard to allocation and licensing of spectrum for PCS services. Furthermore, the Commission should be particularly reluctant to waive its cut-off procedures with regard to filing pioneer preference requests when it appears that the waiver applicant has failed to exercise due diligence. In-Flight has been particularly dilatory and should not be

rewarded for its disregard for the Commission's process when the result frustrates the public interest.

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COMMENTS OF PACTEL PAGING

PacTel Paging ("PacTel"), by its attorneys, hereby submits its comments¹ on the Petition For Acceptance of Application or, Alternatively a Waiver of Section 1.402(c) of the Commission's Rules ("Petition"), submitted by In-Flight Phone Corporation ("In-Flight") seeking acceptance by the Commission of its Application for a Pioneer's Preference to Operate a Live Audio News, Information, and Entertainment Service for Airline Passengers on the 901-902 MHz and 940-941 MHz Bands, filed

¹ To PacTel's knowledge, the Application and accompanying Petition have not been listed by the Commission in a Public Notice. There is, therefore, no established response date for these comments. PacTel is submitting its comments at this time, having just recently learned of the In-Flight proposal.

October 30, 1992 ("Application").² The following is respectfully shown:

I. INTRODUCTION

1. PacTel is a fully separated subsidiary of Pacific Telesis Group ("Telesis"). PacTel is the fourth largest provider of one-way messaging services in the United States. PacTel operates extensive common carrier and private carrier one-way messaging systems in thirteen states which serve over 800,000 units. PacTel provides a broad array of one-way messaging services over these facilities, including tone, voice, digital display, alphanumeric and information services. PacTel also offers two-way mobile telephone service and air-ground radiotelephone services.

2. PacTel is an active, long time proponent of narrowband personal communications services, such as those envisioned by the Commission in its recent Notice of Proposed Rulemaking and Tentative Decision to Establish a New Personal Communications Service, FCC 92-333 , released August 14, 1992 ("PCS NPRM"). For example, PacTel's parent, Telesis, notified the Commission in July 1991 that it would undertake experimentation under its existing experimental license to test an advanced technology platform called "Advanced Architecture

² The Application seeks authority to use frequencies that have been proposed by the Commission in ET Docket 92-100 to be allocated for narrowband PCS uses. Since the cut-off date for preference requests in this docket passed long ago, In-Flight is seeking a waiver.

Paging."³ PacTel, at that time, also submitted a Petition for Rulemaking for this new service.⁴ PacTel's active involvement in the development of the next generation of messaging services has continued with further experimentation through its research affiliate and the filing of ongoing experimental reports with the Commission.⁵

3. PacTel's commitment to narrowband PCS services is further reflected in the fact that the company filed comprehensive comments and reply comments on the PCS NPRM in ET Docket No. 92-100.⁶ In view of its longstanding role in the narrowband PCS docket, PacTel has a substantial interest in the In-Flight Application and Petition which potentially have a substantive and procedural bearing on the narrowband PCS docket.

³ See "Notice of Details of Experimental Program," filed July 29, 1991, with reference to FCC File No. 1934-EX-TC-91. The experimental license was subsequently assigned to Telesis Technology Laboratories ("TTL"), a wholly owned subsidiary of Telesis. See, also, FCC File Nos. 1658 through 1662-EX-PL-90, and "Draft Test Plan - Simulcast Paging" attached to TTL's Request for Special Temporary Authority, Filed November 21, 1991.

⁴ See PacTel "Petition for Rulemaking" to Establish an Advanced Architecture Paging Service, filed August 2, 1991 (PP-38).

⁵ The advanced messaging experimentation is conducted by TTL under the direction of PacTel. See Telesis Technologies Laboratory "Progress Report April, 1992" filed April 1992. See, also, "Presentation to the FCC", May 27, 1992, and "Meeting with Office of Engineering and Technology, Second Report", August 21, 1992.

⁶ See "Comments of PacTel Paging on the Notice of Proposed Rulemaking" filed November 9, 1992 and "Reply Comments of PacTel Paging" filed January 8, 1993.

II. IN-FLIGHT'S PETITION AND
APPLICATION SHOULD BE DENIED

4. In-Flight makes two arguments in support of its Petition: (1) the cut-off date set forth in the Public Notice issued on April 30, 1992 ("Notice")⁷ does not apply to In-Flight's Application, and, alternatively, (2) a waiver of the deadline for the submission of In-Flight's preference request would serve the public interest. PacTel disagrees with both of In-Flight's arguments and requests that the Commission deny In-Flight's Petition and dismiss the Application. PacTel will address each argument separately.

A. The Cut-Off Date in the Notice Clearly
Applies to the In-Flight Proposal

5. In adopting procedures respecting pioneer preference requests, the Commission purposefully established deadlines so that these requests would not disrupt and delay the allocation of spectrum to new services.⁸ Consequently, Section 1.402(c) of the Commission's Rules plainly states that pioneer preference requests will not be accepted after a cut-off date specified by the Commission. That cut-off date must be announced in a public notice issued no less than thirty (30) days prior to the adoption of a notice of proposed rulemaking ("NPRM") that addresses the service or technology at issue.

⁷ See Public Notice, Mimeo No. 22922, released April 30, 1992 entitled "Deadline to File Pioneer Preference Requests [for] 900 MHz Narrowband Data and Paging".

⁸ See Memorandum Opinion and Order (Gen. Docket No. 90-217), FCC 92-57, released February 26, 1992 at paras. 20-26.

6. There is no question that the cut-off notice for narrowband PCS preference requests was released more than 30 days prior to the adoption of the PCS NPRM as required by the rules.⁹ If anything, the deadline was more liberal than interested parties might have expected.¹⁰ Nevertheless, In-Flight argues that the Notice, though proper¹¹, was ineffective as to its

⁹ The Notice was released on April 30, 1992. The PCS NPRM was released on August 14, 1992.

¹⁰ In adopting the Pioneer Preference Rules, the Commission stated that an applicant for a preference in an existing proceeding must either file an experimental license or a request for a pioneer's preference prior to July 30, 1991. Report and Order, In the Matter of Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488 (1991) ("Pioneer Preference Order"); See, also, Memorandum Opinion and Order, In the Matter of Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, FCC 92-57 (Released February 26, 1992). Narrowband PCS appears to have been part of an existing proceeding when the preference rules were adopted either by virtue of the ongoing PCS inquiry (Gen. Docket No. 90-314) or the Telocator "Advanced Messaging Service" rulemaking request (RM-7617). Yet, the Commission allowed narrowband PCS preference applicants until June 1, 1992 to submit requests, effectively negating the earlier established July 30, 1991 deadline. This extension potentially prejudiced PacTel since it was one of the few requesters who met the original deadline. See PacTel's Petition for Reconsideration of Tentative Decision Denying Preference Request (filed September 14, 1992) at p. 7, fn. 12. Had the initial deadline been enforced, In-Flight would not be entitled to file its Application because it filed its experimental license application for its proposed service two months after the original cutoff date contained in the Pioneer Preference Order. See Petition at 3.

¹¹ In-Flight implicitly acknowledges the validity of the Notice by failing to argue against it. In-Flight also acknowledges that the Notice encompasses all three megahertz of the 900 MHz band set forth in the PCS NPRM for narrowband PCS. In-Flight states "the bands to which this filing deadline applied are 901-902 MHz, 930-931 Mhz, and 940-941 MHz." Application at p. 5, fn. 7.

proposed service because In-Flight's proposed live audio news, information, and entertainment services are not "narrowband data and paging" services.¹²

7. PacTel disagrees. The Notice did in fact establish a deadline for In-Flight's Application because In-Flight's proposed service clearly constitutes a narrowband data service in the 900 MHz band. In-Flight's proposed service seeks to offer data (e.g., information) to airline passengers¹³ through the use of a narrowband spectrum allocation (e.g., 50 kHz).¹⁴ In fact, the In-Flight proposal is similar to others that were under

¹² In-Flight misstates the actual wording of the Notice several times. In references to the actual wording of the Notice on pages 2, 5, and 9, In-Flight inserts the word "mobile" in front of the word "data". Much of In-Flight's argument hinges on the altered wording of the Notice. Even if the Commission had inserted the word "mobile" the Notice nonetheless would have constituted notice to In-Flight that an allocation procedure was underway for these bands and it should submit its application within the cutoff date. Furthermore, In-Flight's service is a mobile, as opposed to a fixed service, because it seeks to provide service to mobile receivers -- airplanes.

¹³ Most of the other proposed narrowband PCS services are more traditional terrestrial data services, such as one-way and two-way messaging. However, the definition of one-way messaging does not preclude information services, such as those proposed by In-Flight. Indeed, several operators are starting to provide information services by providing news reports, weather, and financial information to subscribers. See, e.g., Motorola's EMBARC services, and PacTel's NewsCast services (see Exhibit 1).

¹⁴ In-Flight's bandwidth request -- two 25 kHz channels -- is within the current range of narrowband PCS proposals, and within the Commission's alternative channel plans. See, e.g., PCS NPRM at para. 48-52 (Commission suggests three alternatives -- 50 kHz channels, 250 kHz channels, and 500 kHz channels). The bandwidth range of current proposals for narrowband PCS services is from 25 kHz (e.g., Dial Page - Acknowledgement Paging) to 250 kHz (PageNet - VoiceNow).

active consideration in ET Docket No. 92-100.¹⁵ Furthermore, long before the release of the narrowband PCS cut-off Notice, the Commission announced that it intended to "broadly define personal communication services" to include a "family" of portable and mobile offerings which could provide information in various forms to individuals and business, and could be integrated with a variety of competing networks."¹⁶ Consequently, In-Flight should not be heard to argue that it lacked notice its proposal would be subject to the well-publicized filing deadline.¹⁷

8. In the final analysis, it makes no difference whether the text of the Notice caused In-Flight to understand that its proposed service to airplane passengers was subject to a filing deadline. The simple fact is that the proposal relates to frequencies that are the subject of an active rulemaking proceeding. The Commission's pioneer preference procedures must be applied to preclude the filing of a new pioneer preference request respecting frequencies that are in the midst of an on-

¹⁵ See PacTel's Petition for Rulemaking to Establish a Ground-to-Air Paging Service filed October 15, 1991 (PP-39).

¹⁶ See Policy Statement and Order, GEN Docket No. 90-314, adopted October 24, 1991, 6 FCC Rcd 6601, at para. 3 and n.2 (1991).

¹⁷ In-Flight seems to want to eat its cake and have it too. On the one hand, it argues that it proposes a radically different service that should not be subject to the narrowband PCS cut-off. On the other, it seeks an allocation of spectrum and a preference in the bands earmarked by the Commission for narrowband PCS. In-Flight cannot have it both ways.

going proceeding.¹⁸ Since In-Flight filed its Application 105 days after the adoption of the PCS NPRM and 77 days after the actual release, the Commission's Rules clearly prohibit its acceptance.¹⁹

B. In-Flight Has Failed to Justify a Waiver

9. In-Flight argues that it is entitled to a waiver if its Application is deemed by the Commission to be subject to the cut-off date established by the Notice. PacTel strongly disagrees. An applicant seeking a waiver of a Commission rule bears the burden of establishing that there is good cause for a waiver and that granting a waiver will serve the public interest. FCC Rules, Section 1.3. Commission precedent establishes that the burden is particularly heavy when an applicant is seeking the waiver of a procedural cut-off date. See Amendment of Table of Allotments, FM Broadcast Stations (Vancouver, Coos Bay, and

¹⁸ The rules provide that preference requests will be tentatively acted upon when an NPRM is initially adopted. Since it is not the Commission's practice to initiate separate proceedings which propose inconsistent uses of common spectrum, the issuance of an NPRM effectively removes the subject spectrum from play pending the outcome of the proceeding. Implicit in this procedure is the conclusion that a pioneer preference application cannot be entertained for spectrum that is the subject of an ongoing proceeding even if the proposed use is at variance from the use proposed in the NPRM.

¹⁹ To the extent that In-Flight's Application is construed as proposing a quasi-broadcasting service, the denial of its Petition is further justified based upon the Commission's conclusion that PCS spectrum would not be devoted to broadcast services. See PCS NPRM at para. 30.

Corvallis, Oregon), 4 FCC Rcd. 839, fn. 3 (Pol. Rules Div. 1989) (cut-off rules are procedural cornerstone critical to administration and will not be waived without an "extremely compelling showing"). And, the Commission must avoid granting a waiver which would, in effect, eviscerate its rules.²⁰ Here, In-Flight has failed to meet the applicable waiver standards.

10. In-Flight argues that the sole purpose of the rule that pioneer preferences be filed before a notice of proposed rulemaking is to eliminate speculative filings between the adoption and release of an NPRM.²¹ This is not the case. The cutoff was established not only to curb speculative applications, but also to bring order to the preference process so that allocation proceedings with respect to a particular service, band, or technology would not be disrupted or delayed.²² Accepting In-Flight's Application would clearly undermine the Commission's purposeful effort to create an orderly process with

²⁰ WAIT Radio v. FCC, 418 F.2d 1153, 1557 (D.C. Cir. 1969), cert. denied 409 U.S. 1027 (1972). See, also, Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990) (a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest).

²¹ Petition at p. 7.

²² In adopting the cutoff rule, the Commission found it administratively desirable to impose a deadline. Pioneer Preference Order, para. 26. One reason for the adoption of such a rule was to eliminate speculative filings between the adoption date of an NPRM and the release date. Another rationale was to allow the Commission to evaluate all preference requests more efficiently and fairly without adversely impacting innovative parties. In no instance, however, would an applicant be permitted to file pioneer preference requests after the adoption of the NPRM.

an element of finality. Allowing an endless stream of pioneer preference requests would subject the Commission and all the commenters to continuing rounds of comments and replies which would disrupt the PCS NPRM.²³

11. If In-Flight's waiver argument is accepted, anyone could file a pioneer preference request for already earmarked spectrum simply by stating that the spectrum will be used for a service facially different than previously proposed.²⁴ To avoid this disruption, the Commission would be forced to incorporate in each NPRM every conceivable use of the band to ensure that no one claims notice has not been given. The better course is to deny In-Flight's waiver and thus hold firm on the well considered cut-off procedures.

12. The Commission should be particularly reluctant to waive its cut-off procedures when it appears that the waiver applicant has failed to exercise due diligence. In-Flight did not tender its Application until 105 days after the adoption of the PCS NPRM. This late filing increases the possibility that the PCS docket will be delayed if the Commission accepts In-Flight's Application. Commenters in the PCS proceeding are nearly unanimous in their view that the docket should be

²³ This proceeding has already been subject to more than one opportunity to comment on the existing pioneer preference applications. See footnote 10 above.

²⁴ For instance, an applicant could file for a pioneer preference for a new fixed service (such as vehicle telemetry) in this band merely because the possibility for such a service was not included in the PCS NPRM.

expedited to maintain the U.S. competitiveness in the marketplace.²⁵ The Commission itself has indicated that it considers time to be of the essence.²⁶ Under these circumstances, In-Flight should be held to a strict standard of diligence in submitting its request, which it does not appear to have met. In-Flight has been dilatory and it should not be rewarded for it when the result would frustrate the public interest.

III. CONCLUSION

The foregoing premises having been duly considered, PacTel respectfully requests that the Commission deny In-Flight's Petition.

Respectfully submitted,

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²⁵ See, e.g., Arch reply comments at p. 9, Motorola comments at p. 16, Dial Page comments at pp. 4-5, MTEL comments at pp. 2-5, API comments at p. 2.

²⁶ PCS NPRM at paras. 6-7.

EXHIBIT 1

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CERTIFICATE OF SERVICE

I, Lois Trader, a secretary in the law firm of Bryan Cave, hereby certify that on this 26th day of January, 1993, I caused copies of the foregoing COMMENTS OF PACTEL PAGING to be sent, by first class mail, postage prepaid, to the following:

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